No. 94-1393

IN THE

Supreme Court of the United States

October Term, 1994

DONALD SELSKY,

Petitioner,

against

JERRY YOUNG, a/k/a RAMADAN,

Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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April 6, 1995

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REASONS FOR DENYING THE WRIT

Certiorari is not warranted because the question of whether the petitioner should be treated differently than any other prison official for purposes of absolute immunity is not one of national importance. There is no split in the Circuit Courts of Appeal on the narrow issue presented, and there is no other aspect of this case which would otherwise warrant the Court's discretionary review.

Despite the petitioner's claim that this case presents an important question of federal law, it is readily apparent that it is not. This Court has already decided that the availability of a qualified immunity defense strikes the appropriate balance in weighing the public's interest in protecting prison officials who conduct disciplinary proceedings from the problems posed by vexatious litigation, while at the same time preserving prisoners' access to federal courts to seek recourse when these officials violate clearly established constitutional rights. *Cleavinger v. Saxner*, 474 U.S. 193, 206-207 (1985). The petitioner does not suggest that *Cleavinger* was wrongly decided, but only that it should not apply to someone in his position.

I

The Court of Appeals Correctly Held That Under *Cleavinger*, Petitioner Was Not Entitled To Absolute immunity.

New York State's prison disciplinary system suffers from the same type of procedural shortcomings which were identified in *Cleavinger*. *Young v. Selsky*, 41 F. 3d 47, 53 (2d Cir 1994). Prisoners are denied the right to counsel to represent them at the hearing, and may be denied the right to confront adverse witnesses and in some cases to even know the witnesses' names or the evidence that is being used against them. *Id.* at 53-54.[1] *Matter of Abdur-Raheem v. Mann* __ NY2d__ , 1995 WL 57482. (February 14, 1995). Although such procedures may be all that is required under the Constitution, *Wolff v. Mc Donnell*, 418 U.S. 539 (1974), they do not represent "a judicial

[1] In one respect New York prisoners are provided with even fewer procedural protections than those afforded to the inmates in *Cleavinger* -- they are not allowed to have counsel substitute represent them at the hearing. New York presently does not even provide counsel substitute to an illiterate or retarded inmate. *See, e.g., Horne v. Coughlin*, 795 F. Supp. 72 (N.D.N.Y. 1991).

process of the kind and depth that has occasioned absolute immunity". *Cleavinger*, supra, 474 U.S. at 206. The same factors which led the Court to distinguish its prior ruling in *Butz v. Economou* , 438 U.S. 478 (1978) -- the lack of adequate procedural protections and insulation from external pressures such as those provided under the federal Administrative Procedures Act (5 U.S.C. §551 et seq.) -- logically lead to the conclusion that Mr. Selsky is not entitled to absolute immunity.[2]

In New York, the procedural shortcomings at the hearing level are not ameliorated through the Department's internal appellate procedures.[3] *Young*, 41 F.3d at 53-54. Thus, the **only** *Butz* factor in which petitioner Selsky's position could even be arguably much different than that of a prison hearing officer, is the extent of his impartiality and independence from external influence. The Court of Appeals concluded that petitioner, being responsible both for training and advising hearing officers, and then deciding the inmates' appeals from adverse decisions, while remaining subordinate to officials in the Commissioner's office, was not so insulated from external pressures that he should be afforded a greater degree of immunity than that provided to the hearing officers themselves. *Young*, 41 F.3d at 53-54

Support for this conclusion was drawn from testimony in other cases which established, *inter alia*, that Selsky sometimes gives specific advice to hearing officers in the middle of a hearing, and then may subsequently rule on what in essence was his own advice.[4] The court also considered his testimony that prison Superintendents are

[2] The Department of Correctional Services is specifically exempted from New York's statute which establishes the general procedural rules for its administrative tribunals. State Administrative Procedures Act, Sections 102.1 and 301 et. seq. (McKinney). Because of this exemption, the quasi-judicial procedural protections available in virtually any other state administrative tribunal are not required in prison disciplinary hearings.

[3] In some aspects the procedures at the appellate level are more onerous for the prisoner as there is no right to any staff assistance in preparing an appeal, and New York prison officials will not allow an inmate law clerk who is assisting another prisoner with his appeal to listen to the tape of the hearing. Affidavit of Donald Selsky dated May 20, 1994 in *Matter of Graziano v. Mann*, Supreme Court Albany County, Index No. 1717 - 94.

[4] The court below described the development of the "expanded" and "unorthodox" record in this case. 41 F.3d at 49-51 . In his appeal, Mr. Young had argued that, at a minimum, he should have been allowed to conduct discovery with respect to whether Mr. Selsky was truly independent, especially given the fact that

likely to complain about his rulings in certain cases, and that these complaints may be discussed during Selsky's evaluation by his supervisor, an Assistant Commissioner who is also responsible for supervising Superintendents. *Id.* at 53.[5]

II

The Question Presented Is Not A Significant One in Terms of Its Impact on Prison Litigation Generally

Far from a presenting an issue of national importance, the narrow question presented in the petition - whether someone in petitioner's position should be afforded absolute immunity - is extremely limited in scope and in its ramifications for the prison disciplinary systems in other states. Other than those cases involving Mr. Selsky, there appears to have been only one post-*Cleavinger* case where the issue of absolute immunity for a central office appellate reviewer was raised. *Shaddy v. Gunter*, 690 F. Supp. 860, 864-65 (D. Neb. 1988) (appellate review panel entitled to absolute immunity). Given the petitioner's claims with respect to the number of prisoners' federal lawsuits involving procedural due process claims, Pet. Br. at 10, the fact that there are apparently no other reported cases on this issue belies the claim that this case is one of significant importance for anyone other than the petitioner.

Although the petitioner claims that the decision below "directly conflicts" with the reasoning in *Shelly v. Johnson*, 849 F.2d 228 (6th Cir. 1988), Pet. Br. pp. 9,12, *Shelly* involved the degree of immunity to be accorded "independent" hearing officers. It does

Magistrate Judge Di Bianco's Report-Recommendation had relied on an affidavit from another case. *See* Pet. Br. p. 32 (a) n 4.

[5] According to one of his former supervisors, Mr. Selsky would discuss "difficult" cases with him. Trial Testimony of Louis F. Mann in *Hameed v. Mann*, 89 CV 578 11/2/93, T. 91-92). Mann also testified that, while he was a Superintendent, Selsky would sometimes contact him for information which was not apparent on the record of a hearing. *Id.*, 40-41. *Compare, Butz v. Economou*, supra, 438 U.S. at 513-14, citing provisions of the Administrative Procedure Act, including 5 U.S.C. Sec. 554 (d)(1) (hearing examiner may not contact third parties, including agency officials, unless on notice and opportunity for all parties to participate).

In *Hameed*, Mr. Selsky testified that he depends on the Department's Office of Counsel -- hardly disinterested lawyers -- for legal advice about isues that come up in hearings. *Compare, ABA Code of Judicial Conduct*, Canon 3, Subd.(4) (judge may only seek legal advice from a disinterested expert upon notice to the parties and an opportunity to respond).

not speak directly to the question posed by someone like Mr. Selsky who reviews decisions made by hearing officers in a system which lacks the procedural protections and independence required for a grant of absolute immunity.[6] *Cf. Moye v. Selsky*, 826 F. Supp. 712, 721-22 (S.D.N.Y. 1993) (the inherent inequity in giving absolute immunity to the appellate review officer while denying it to the hearing officers runs counter to the teachings of this Court which emphasize that State actors are to be treated similarly in terms of immunity) (citations omitted).[7]

An additional complicating factor in this case is the manner in which the Department has structured Mr. Selsky's dual role as its chief disciplinary trainer/advisor as well as the appellate review officer. The majority opinion in the Court of Appeals explicitly recognized that this is a different scenario than that which would be presented by someone whose sole responsibility was to review inmates' disciplinary appeals.

> We have no hesitancy in stating that this is far from an easy case and the factors that influence us most are the lack of a guarantee of defendant's independence and insulation from communication with hearing officers about specific cases. *Should this change in the future by restructuring defendant's position or by other means, the result might well be different.* (citing *Cleavinger*, 474 U.S. at 208) (emphasis supplied).

41 F.3d at 54.

Following this Court's approach in *Cleavinger*, the Second Circuit has left the door open for the Department to redefine the petitioner's position to eliminate what the court believed were the most influential factors weighing against a grant of absolute immunity. Since there is no suggestion by the petitioner that this would be impracticable, a wiser course of action at this time is to allow the petitioner and his

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[6] We believe that *Shelly* was wrongly decided, in part because the Court of Appeals failed to give appropriate weight to the lack of procedural protections when considering whether the disciplinary proceedings were sufficiently "quasi-judicial" in nature so as to warrant absolute immunity for the individuals who preside over them. *Compare, Tulloch v. Coughlin*, ___ F. 3d ___ , 1995 WL 87406 (2d Cir February 28, 1995) (so-called "independent" hearing officers are not entitled to absolute immunity where five of the six factors cited in *Butz v. Economou, supra*, militate against such an award). In any event, the court below was correct in distinguishing *Shelly* on the facts of that case.

[7] Since Mr. Selsky is responsible for training and advising hearing officers, granting him absolute immunity could lead to a situation where he is completely immunized and yet those who may have relied on his advice or training (or lack thereof) are forced to defend their actions in court.

employers, if they find the burdens of litigation to be so overwhelming, to bring New York State's prison disciplinary system, and particularly the appellate review process, into more of a quasi-judicial mode. Given this invitation by the Second Circuit Court of Appeals for the Department to solve at least a part of the problem administratively, and the fact that this question has not even been addressed yet by any other Circuit, discretionary review in this Court is not warranted, particularly in the absence of any true hardship on the petitioner.[8] Also, as noted in *Young*, Mr. Selsky has testified that the extent of the litigation he has been involved in does not influence his decision-making process in any way. *Id.* at 53.

Mr. Selsky's dual role of trainer/advisor and appellate review officer militates against granting the writ in another way as well. The central thrust of the petitioner's arguments and those contained in Judge Van Graafeiland's dissent, is that there are so many vexatious and harassing lawsuits filed by prisoners that Mr. Selsky needs absolute immunity to protect him from being subject to suit even when he has, as in this case, the ability to raise qualified immunity as a defense. The argument, however, is based on an emotional appeal to "do something" about the number of prisoner lawsuits rather than a careful analysis of the claim raised and the impact it would actually have on prison litigation.

As the petitioner points out, a prisoner who files a lawsuit over the procedures or results of his disciplinary hearing can sue the hearing officer. He relies on this state of affairs to support his argument. Pet. Br. at 14-15.[9] What he ignores is that granting Selsky, as the appellate review officer, absolute immunity will necessarily have a *de minimis* effect on the number of prisoner lawsuits as long as the hearing officers themselves are subject to suit. Since the hearing officers and Mr. Selsky are both

[8] Despite the large number of lawsuits he has apparently been involved in, Mr. Selsky has not complained about any monetary judgments having ever been taken against him. He would, in any event, be entitled to indemnification under the N.Y. State's Public Officers Law, Sec. 17 (3) (a), and he is represented by the Attorney General's office. *Young*, 41 F.3d at52.

[9] The hearing officers involved in the hearings at issue in this case, who were named as defendants in a second, related suit, were dismissed based on the respondent's failure to serve them. *Young*, 41 F. 3d at 49.

represented by the Attorney General's office, it usually takes only a few words -- not even a separate paper -- to raise the same defenses for Mr. Selsky as those already being made on behalf of the hearing officer, including, where applicable, a claim of qualified immunity in a motion for summary judgment.

Even Mr. Selsky himself is likely to gain little from a favorable decision in this case. Apparently the principal litigation burden which affects petitioner personally is having to be deposed, as he does not complain about the number of trials he has been called to testify at.[10] However, even if granted absolute immunity for his appellate review role, there could be reasons arguing in favor of subjecting Mr. Selsky to being deposed as a non-party witness in disciplinary cases where questions arose concerning hearing procedures. For instance, when a prisoner has raised several issues on appeal and Mr. Selsky has reversed or modified the decision, apparently concluding that the hearing officer violated the prisoners' rights in some unidentified manner, it may be important for the prisoner to know upon what basis he made his decision. Since the practice in Mr. Selsky's office is to tell prisoners only whether their hearing has been affirmed, reversed or modified, without any explanation, some discovery of the reasons for which the decision was made may be in order.[11]

Moreover, because of his role as the person responsible for hearing officer training and supervision, Mr. Selsky himself may likely be a defendant even if he was granted absolute immunity for his function as an appellate review officer. *See e.g.*, *Gilbert v. Selsky*, 867 F. Supp. 159, 166 (S.D.N.Y. 1994) (Selsky is held liable both for his role in affirming defective hearing and for failing to adequately train and supervise hearing officers). Presumably he also could be held liable for advice and direction given to a hearing officer, if such advice was a proximate cause of a constitutional

[10] Mr. Selsky may be called to testify by other prison officials, as was the case in *Hameed v. Mann*, *supra*, where he was called by the defendant hearing officer and Superintendent to vouch for the procedures employed in that case.

[11] In *Tulloch v. Coughlin*, supra, __ F.3d at __, 1995 WL 87406 at * 3, the court found that the value of one of the *Butz* factors, the importance of precedent, was diminished because the Department does not have a compendium of hearing results and appeals for hearing officers to rely on, as a result of which similar factual situations could lead to different results.

violation.

While the petitioner has ably used the large number of prisoner lawsuits to draw the Court's attention to his cause, this case cannot deliver any meaningful relief to crowded judicial dockets. Even a resolution *in favor* of the petitioner would have no impact on the number of prisoner lawsuits, or the amount of work involved in defending them. To the extent that the problems of vexatious prison litigation are amenable to being addressed through decisions of this Court, this case does readily lend itself to being applied in any broad manner.[12] Unless the Court wishes to revisit the issues already decided in *Cleavinger*, granting certiorari in this case would be a diversion of judicial resources.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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[12] There has been no suggestion that the instant case, challenging the denial of witnesses requested in several disciplinary hearings, is frivolous.